APPENDIX

IN THE CIRCUIT COURT OF THE STATE
OF OREGON FOR THE COUNTY OF LINN

Case No. 010333

MARSHA SEIBER and ALVIN SEIBER,
Plaintiffs,

v.

THE STATE OF OREGON, by and through its
DEPARTMENT OF FORESTRY,
Defendant.

ANSWER TO SECOND AMENDED COMPLAINT WITH AFFIRMATIVE DEFENSES AND COUNTERCLAIMS

Defendant State of Oregon, by and through its Department of Forestry, answers Plaintiffs Alvin and Marsha Seibers' Second Amended Complaint as follows:

ANSWER

1.

In answer to paragraph 1 of the Second Amended Complaint:

The State admits upon belief that Marsha Seiber owns approximately 200 acres of property located in Linn County, Oregon (the "Seiber property"). The remaining allegations of the paragraph are denied.

2.

In answer to paragraph 2 of the Second Amended Complaint:

The State admits that OAR 629-24-809 was adopted by the State Board of Forestry in 1991. The State admits that OAR 629-24-809 was renumbered to OAR 629-665-0210 in 1996 without any changes in text. The texts of the rules cited are a matter of public record and their meaning is for the court to decide. The State denies that the Seibers' summary correctly interprets the rules in question and notes that portions of text and context have been omitted. Except as admitted, paragraph 2 is denied.

3.

In answer to paragraph 3 of the Second Amended Complaint:

The State admits that in 1994 approximately 40 acres of the Seiber property were identified and inventoried as part of a northern spotted owl "resource site". The State denies the remaining allegations of paragraph 3.

4.

In answer to paragraph 4 of the Second Amended Complaint:

The State admits that owl surveyors did not record responses from nesting owls known to be associated with the resource site in 1997. The State admits that the Seibers filed Notification No. 98-791-40082, giving notice of their intent to log certain parts of their property. In the notification, the Seibers indicated that they were willing to not conduct logging operations while spotted owls might be nesting in the area or until the young spotted owls had fledged. The State admits that Notification No. 98-791-40082 was not approved because the Seibers failed to explain how they would protect

the resource site. The State denies the remaining allegations of paragraph 4.

5.

In answer to paragraph 5 of the Second Amended Complaint:

The State admits that the Seibers appealed the denial of Notification No. 98-791-40082 and that the Board of Forestry entered a Final Order affirming the refusal to approve the notification on March 28, 1998. The reasons for the refusal to approve the notification as complying with the Oregon Forest Practices Act are listed in the order. The State denies the remaining allegations of paragraph 5.

6.

In answer to paragraph 6 of the Second Amended Complaint:

The State admits that the USFWS issued a Final Order on November 9, 2000 denying the Seibers an "incidental Take Permit" ("ITP") for the "Little Wiley" owls. The permit, if granted, would absolve the Seibers (and the State) from civil and criminal liability in the event that the contemplated timber harvest resulted in a "taking" of the Northern Spotted Owl. The remaining allegations of paragraph 6 are denied.

7.

In answer to paragraph 7 of the Second Amended Complaint:

The State admits that the State Forester informed the Seibers on August 3, 2001 that the nesting site had been declared abandoned. The State denies the remaining allegations in paragraph 7.

8.

In answer to paragraph 8 of the Second Amended Complaint:

The State responds as it responded in paragraphs 1 through 7 of this Answer.

9.

In answer to paragraph 9 of the Second Amended Complaint:

The State admits that the Seibers characterize the claim as a declaratory judgment that OAR 629-665-0210 effects a taking under the Fifth Amendment to the U.S. Constitution. The State denies that the rule results in taking either facially or as applied and denies that justiciable controversy is alleged under ORS 28.010 *et seq*. The State denies the remaining allegations in paragraph 9.

10.

In answer to paragraph 10 of the Second Amended Complaint:

The State responds as it responded in paragraphs 1 through 7 of this Answer.

11.

In answer to paragraph 11 of the Second Amended Complaint:

The State denies all of the allegations in paragraph 11.

12.

In answer to paragraph 12 of the Second Amended Complaint:

The State denies all of the allegations in paragraph 12.

13.

In answer to paragraph 13 of the Second Amended Complaint:

The State denies all of the allegations in paragraph 13.

14.

In answer to paragraph 14 of the Second Amended Complaint:

The State denies all of the allegations in paragraph 14.

15.

In answer to paragraph 15 of the Second Amended Complaint:

The State denies all of the allegations in paragraph 15.

16.

In answer to paragraph 16 of the Second Amended Complaint:

The State responds as it responded in paragraphs 1 through 7, 11, 13 and 14 of this Answer.

17.

In answer to paragraph 17 of the Second Amended Complaint:

The State denies the allegations in paragraph 17.

18.

In answer to paragraph 18 of the Second Amended Complaint:

The State responds as it responded in paragraphs 1 through 7, 11 and 13 of this Answer.

19.

In answer to paragraph 19 of the Second Amended Complaint:

The State admits that the Oregon Legislature enacted several statues involving threatened or endangered wildlife species. The State denies that the Seibers have correctly quoted ORS 496.192(1). They have improperly omitted portions altering text and contest.

20.

In answer to paragraph 20 of the Second Amended Complaint:

The State admits that ORS 527.630(1) was partially amended in 1987. The State denies that the Seibers have correctly quoted a part of ORS 527.630(1) in that they have omitted portions altering text and context.

21.

In answer to paragraph 21 of the Second Amended Complaint:

The State denies the allegations in paragraph 21.

22.

In answer to paragraph 22 of the Second Amended Complaint:

Paragraph 22 of the Second Amended Complaint is argument and is both equivocal and misleading. The term "critical habitat" is a term of art. The State admits that the United States designated critical habitat on federal lands. The State denies that either the Seibers or the State are thereby absolved from compliance with civil or criminal provisions of the Federal Endangered Species Act. Paragraph 22 is denied, except as stated herein.

23.

In answer to paragraph 23 of the Second Amended Complaint:

The State denies all the allegations in paragraph 23.

24.

In answer to paragraph 24 of the Second Amended Complaint:

The State responds as it responded in paragraphs 1 through 7, 13, 19, 21 and 22 of this Answer.

25.

In answer to paragraph 25 of the Second Amended Complaint:

The State denies all the allegations in paragraph 25.

AFFIRMATIVE DEFENSES

For a FIRST AFFIRMATIVE DEFENSE, the State alleges: (Another Action Pending Between the Same Parties for the Same Cause- ORCP 21A(3))

26.

The State realleges its answer herein.

27.

In 1998, the Seibers filed *Marcia Seiber, Alvin Seiber, and the Oregon Small Woodlands Association v. State of Oregon, by and through the Oregon State Board of Forestry* in Linn County Circuit Court Case No. 980649. The Second Amended Complaint in that case is nearly identical to the Second Amended Complaint in the instant matter.

28.

By Judgment dated December 8, 1999, the Circuit Court dismissed all of OSWA's claims with prejudice and allowed

the State's motion for summary judgment against the Seibers on all claims. That Judgment was affirmed without opinion by the Oregon Court of Appeals, CA #108914, and the Oregon Supreme Court denied review. Certiorari is currently pending before the United States Supreme Court.

29.

ORCP 21A(3) provides that a matter may be dismissed when there is another action pending between the same parties for the same cause.

30.

In the instant case Plaintiffs seek a judgment predicated upon the order of the board on that case dated March 27, 1998 and not upon its subsequent order in this application dated January 17, 2001.

For a SECOND AFFIRMATIVE DEFENSE,
the State alleges:
(Subject Matter Jurisdiction Exclusively in Court of Appeals for Claim One Under ORS 183.400(2))

31.

The State realleges its answer above.

32.

The validity of OAR 629-665-0210 was a subject of a contested case hearing between the parties on or about March 23, 1998.

33.

The validity of any applicable rule may be determined by a court upon review of an order pursuant to ORS 183.480. ORS 183.480(2). A party to a contested case in which the agency determines the validity of a rule may obtain judicial review of the validity of the rule only as provided for an order in a contested case. ORS 183.400(1).

34.

The Court of Appeals has exclusive jurisdiction to review the Board of Forestry's final order. ORS 183.482(1). Therefore, the Court of Appeals has exclusive jurisdiction to review the validity of the rule on a challenge brought by the Seibers.

35.

The Circuit Court lacks jurisdiction to determine the validity of OAR 629-665-0210 in this case.

For a THIRD AFFIRMATIVE DEFENSE,
the State alleges:
(Subject Matter Jurisdiction in Court of Appeals
Under ORS 183.400(1))

36.

The State realleges its answer above.

37.

The validity of any rule may be determined upon a petition by any person to the Court of Appeals in the manner provided for review of orders in contested cases. ORS 183.400(1).

38.

In Claim One of the Second Amended Complaint, the Seibers seek declaratory relief regarding the validity of OAR 629-665-0210.

39.

The Uniform Declaratory Judgment Act ("UDJA"), ORS 28.010 *et seq.*, does not confer jurisdiction on the Circuit Court for a challenge to the validity of any administrative rule.

FOURTH AFFIRMATIVE DEFENSE
(Immunity)

40.

The State of Oregon is immune from suit unless the Oregon Legislature passes a general law waiving the State's sovereign immunity from suit. Oregon Constitution, Art. IV, § 24. UDJA is not a general law that waives the State's immunity or allows the State to be sued by a person seeking declaratory relief. Therefore, UDJA does not provide an independent basis for subject matter jurisdiction in the Circuit Court.

41.

The Circuit Court lacks jurisdiction to review Claim One of the Complaint.

For a FIFTH AFFIRMATIVE DEFENSE,
the State alleges:
(Second Exercise of Concurrent Jurisdiction
for Second Claim and Third Claim, Count One)

42.

The State realleges its answer and paragraphs 31 to 41 above.

43.

The Board of Forestry and the Circuit Court have concurrent jurisdiction to determine the issue of whether a refusal by the State to approve a written plan effects a taking of a claimant's property.

44.

On March 28, 1998 and on January 17, 2001, the Board of Forestry exercised its jurisdiction and determined that the refusal to approve the Seibers' written plan does not effect a taking of their property.

45.

The Circuit Court does not have jurisdiction to determine the issue of whether a refusal by the State to approve a written plan effects a taking of the Seibers' property. Judicial Review of that decision rests with the Oregon Court of Appeals following a contested case hearing.

For a SIXTH AFFIRMATIVE DEFENSE, the State alleges: (Issue Preclusion for Second Claim, Second Claim and Third Claim, Count One)

46.

The issue (including all sub-issues) of whether the refusal to approve the Seibers written plan effects a taking of their property in Claims Two and Three in the Second Amended Complaint is identical to an issue (including all sub-issues) in the March 23, 1998 contested case before the Board of Forestry.

47.

The issue was actually litigated and was essential to the final decision on the merits in the Seiber contested case before the Board of Forestry on March 23, 1998.

48.

The Seibers had a full and fair opportunity to be heard on the issue in the March 23, 1998 contested case before the Board of Forestry.

49.

The Seibers were the exact parties that petitioned for the contested case before the Board of Forestry on March 23, 1998.

50.

The March 23, 1998 contested case before the Board of Forestry is the type of administrative proceeding to which the Circuit Court will give preclusive effect. The Board of Forestry maintains procedures that are sufficiently formal and comprehensive. The contested case before the Board of Forestry is trustworthy. Application of issue preclusion would facilitate prompt, orderly and fair problem resolution. The Seiber contested case before the Board provides the same quality of proceedings and opportunity to litigate that is presented by the Circuit Court.

51.

The March 28, 1998 Final Order of the Board of Forestry determined the issue (including all sub-issues) and concluded that the refusal to approve the Seiber's written plan does not effect a taking of their property.

52.

The Circuit Court should give preclusive effect to the Board of Forestry's determination of the issue (including all sub-issues).

For an SEVENTH AFFIRMATIVE DEFENSE,
the State alleges:
(Issue Preclusion for Second Claim)

53.

The State realleges 46 to 52 above.

54.

The issue (including all sub-issues) of whether the Board of Forestry exceeded its authority in adopting OAR 629-665-0210 in Claim One in the Second Amended Complaint is identical to an issue (including all sub-issues) in the March 23, 1998 contested case before the Board of Forestry.

55.

The issue was actually litigated and was essential to a final decision on the merits in the contested case before the Board of Forestry on March 23, 1998.

56.

The Seibers had a full and fair opportunity to be heard on the issue in the March 23, 1998 contested case before the Board of Forestry.

57.

The Seibers were the exact parties that petitioned for the March 23, 1998 contested case before the Board of Forestry.

58.

The contested case before the Board of Forestry is the type of administrative proceeding to which the Circuit Court will give preclusive effect. The Board of Forestry maintains procedures that are sufficiently formal and comprehensive. The Seiber contested case before the Board of Forestry was trustworthy. Application of issue preclusion would facilitate prompt, orderly and fair problem resolution. The Seiber contested case before the Board provides the same quality of proceedings and opportunity to litigate that is presented by the Circuit Court.

59.

The March 28, 1998 Final Order of the Board of Forestry in the March 23, 1998 contested case determined the issue (including all sub-issues) and concluded that the Board of Forestry did not exceed its authority in adopting OAR 629-665-0210.

60.

The Circuit Court should give preclusive effect to the Board of Forestry's determination of the issue (including all sub-issues).

For an EIGHTH AFFIRMATIVE DEFENSE,
the State alleges:
(Claim Preclusion for Second Claim)

61.

The State realleges paragraphs 46 through 60.

62.

The Seibers may not raise the issue (or any sub-issues) of whether the Board of Forestry exceeded its authority in adopting OAR 629-665-0210 in this proceeding since they could have raised the issue (and all sub-issues) in the March 23, 1998 or the later proceeding contested case before the Board of Forestry.

For a NINTH AFFIRMATIVE DEFENSE,
the State alleges:
(Claim Preclusion for Second Claim and Third Claim, Count One)

63.

The State realleges paragraphs 46 through 60.

64.

The Seibers could have raised the issue (and all sub-issues) of whether the Board of Forestry's refusal to approve their written plan effects a taking their property in the contested case before the Board of Forestry and is thus precluded from raising the issue in this proceeding.

For a TENTH AFFIRMATIVE DEFENSE,
the State alleges:
(Ripeness for Claims Two and Three)

65.

The State realleges paragraphs 46 through 60.

66.

The Seibers have not yet obtained a final decision (as opposed to a final order) regarding the application of OAR 629-665-0210 to their property. The Seibers have not yet obtained a final order regarding the application of OAR 629-665-0210 to property other than the Seiber property. The Seibers have failed to seek in good faith the waivers, modifications and exceptions available from the State.

67.

The State Forester may allow an operator, landowner, or timber owner to waive or modify forest practice rules for various reasons if he makes certain determinations based upon a request by the operator, landowner or timber owner. The Seibers have not requested such waivers or modifications.

68.

Claims Two and Three of the Complaint are not ripe for judicial resolution.

For a ELEVENTH AFFIRMATIVE DEFENSE,
the State alleges:
(Waiver for Claims Two and Three)

69.

The State realleges its answer.

70.

The Seibers notified the State of their intent to harvest timber from portions of their land in 1994 and 1996.

71.

The resource site for the Little Wiley pair of northern spotted owls was identified and inventoried by the State in 1994. The resource site was identified in the State's final order receiving the Seibers' application to log in 1994. The identification was a finding of the State Forester under ORS 527.700. The Seibers could have appealed the identification and inventory of the resource site on or before April 1, 1994.

72.

The Seibers' failure to appeal the finding identifying the resource site for the Little Wiley pair constitutes consent to, and a waiver of any claims arising from, the finding and the application of OAR 629-665-0210 to the resource site.

For an TWELFTH AFFIRMATIVE DEFENSE,
The State alleges:
(Failure to State a Claim for Claim One)

73.

The State realleges paragraphs 1 through 72.

74.

The Seibers fail to allege that the State lacks authority to adopt a rule that effects a taking in some circumstances. The Seibers fail to allege that the State lacks authority to apply a rule in a manner that effects a taking.

75.

The Seibers fail to allege facts sufficient to demonstrate that the Seibers are entitled to declaratory relief.

76.

The Seibers fails to allege facts demonstrating that the Circuit Court has subject matter jurisdiction to determine the validity of OAR 629-665-0210.

For a THIRTEENTH AFFIRMATIVE DEFENSE,
the State alleges:
(Failure to State a Claim for Claims Two and Three)

77.

The State realleges paragraphs 1 through 41.

78.

The Seibers fail to allege facts demonstrating that the State has taken any of their property.

79.

The Seibers fail to allege the ultimate facts sufficient to constitute a claim for relief for Claims Two and Three.

For a FOURTEENTH AFFIRMATIVE DEFENSE,
the State alleges:
(Failure to State a Claim for Attorneys Fees)

80.

No attorney fees shall be awarded unless a right to recover such fee is alleged as provided in ORCP 66 C. A party seeking attorney fees shall allege the facts, statute, or rule which provides a basis for the award of such fees in a pleading filed by that party. ORCP 68 C.

81.

The Seibers failed to allege the facts, statute, or rule that provides a basis for their request for attorney's fees.

82.

The Seibers fail to allege facts sufficient to demonstrate that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest.

FIFTEENTH AFFIRMATIVE DEFENSE
(Illegality)

83.

The State realleges its answer.

84.

On November 9, 2000 the United States acting by and through its Department of Interior, Fish and Wildlife Service denied Plaintiffs an incidental take permit to log the area in question on the basis that the Little Wiley spotted owl site was "active."

85.

Habitat disturbance in and around an "active" owl site may result in a "take" of the owls that is reasonably foreseeable.

86.

Approving a notification that results in "taking" an owl could expose the State to civil and criminal liability under the Federal Endangered Species Act.

87.

Plaintiffs' failure to secure an ITP or a determination of "no jeopardy" placed the State and its officials at risk if the State approved the notification.

SIXTEENTH AFFIRMATIVE DEFENSE
(Claim Preclusion)

88.

All claims concerning the March 1998 refusal to approve the notification no. 98-791-40082 were or could have been litigated in Case No. 980649 decided adversely to the Seibers. The Seibers are precluded from relitigating matters that were or could have been decided in that case.

SEVENTEENTH AFFIRMATIVE DEFENSE
(Estoppel)

89.

In hearings before the State Administrative panels and before the courts the Seibers took the position that they did not require an ITP and that they did not pursue one prior to applying for notification no. 98-791-40082.

90.

The State did not approve the notification based in part upon a record in which the Seibers refused to seek an ITP. The Seibers were represented by counsel in those proceedings and the State relied upon counsel's representation of the Seibers position.

91.

The Seibers should not now be permitted to argue that the agency decision in refusing approval was wrong in 1998 and that a claim based upon the 1998 record, which they constructed is in error, when the Seibers' actions and representations removed the issue of whether it was then possible to get an ITP from consideration.

For a FURTHER SEPARATE ANSWER AND COUNTERCLAIM, The State alleges:

ALTERNATIVE COUNTERCLAIM
(Title to Realty)

92.

The State incorporates by reference all matters admitted in paragraphs 1 through 91.

92.

Should the Seibers prevail on the issue of whether the State has taken any of their property, and if they are awarded compensation, then the State should be awarded an interest in the property commensurate with the compensation paid and all rights and opportunities necessary and customary for possession and use of the property. The award is necessary to prevent unjust enrichment of the Seibers.

WHEREFORE, the State prays for the following relief:

1. Judgment in the State's favor;

2. An award of costs and disbursements;

3. Should the Seibers prevail on the issue of whether the State has taken their property, then allow the State to further consider the application of OAR 629-665-0210 to the Seibers' property;

4. Should the Seibers prevail on the issue of whether the State has taken their property and be awarded compensation, then award the State an interest in the property commensurate with the compensation paid and all rights and opportunities necessary and customary for possession and use of the property; and

5. Any further relief that the Court determines is appropriate.

DATED this 2nd day of December, 2002.

Respectfully submitted,

HARDY MYERS
Attorney General

/s/ Karen L. Moynahan
KAREN L. MOYNAHAN #95492
Assistant Attorney General
Trial Attorney
Of Attorneys for The State
1162 Court Street NE
Salem, OR 97301-4096
(503) 378-6313